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Are Your Non-Compete Agreement and Handbook Still Legal? D.C. Joins National Trend by Enacting a Sweeping Ban on Non-Compete Agreements

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In a developing trend, several states have enacted legislation that either restricts an employer's ability to require an employee to sign a non-compete agreement as a condition of employment or outright prohibits non-compete agreements altogether. A non-compete agreement is simply an agreement that restricts an employee's ability to "compete" with your business. These agreements may establish certain restrictions concerning duration, the geographic area covered, and the types of business activities in which the employee may be restricted from engaging. It is essential for employers to understand whether their states permit non-compete agreements or otherwise establish restrictions on the terms permitted. This article provides an overview of D.C.'s recent comprehensive non-compete ban, surveys less restrictive non-compete laws at the state level, and offers practical guidance for employers who utilize non-compete agreements.

D.C.'s Non-Compete Ban

On January 11, 2021, D.C. passed the Non-Compete Agreements Amendment Act of 2020 (the Act), which contains one of the most expansive bans on non-compete agreements in the country. The Act prohibits employers from requiring an employee to sign a contract or maintain a workplace policy that includes restrictions on employee competition, with limited exceptions. The Act is expected to take effect in fall 2021.

Who is Covered by D.C.'s Non-Compete Ban?

Generally, any employer operating in D.C. is covered by the Act. The Act broadly defines an "employer," as an individual, partnership, general contractor, subcontractor, association, corporation, or business trust operating in the District but does not cover the D.C. government or the U.S. government. Interestingly, the Act does not define what it means for an employer to be "operating in D.C." Therefore, it is unclear whether the ban on non-compete agreements will apply to out-of-state entities with employees living and working remotely in D.C. or employees who occasionally render services for their employers in D.C.

The Act also contains a relatively expansive definition of the term "employee," which is any individual who performs work in D.C. on behalf of their employer. The Act excludes individuals who are unpaid volunteers at educational, charitable, religious, or nonprofit organizations, elected or appointed lay members of religious organizations, individuals employed as casual babysitters in an employer's residence, and certain licensed medical specialists who have completed their medical residency and receive total compensation of at least $250,000 per year.

Which Activities Does D.C.'s Non-Compete Ban Prohibit?

The Act expressly prohibits employers from requiring current or prospective employees to sign a non-compete agreement or maintaining workplace policies that restrict an employee's ability to become employed by another person, receive pay from performing services for another person, or operate their own business. Notably, while statutes in several other states governing non-competes generally permit employers to restrict employees from engaging in other employment while still working for their employers, the Act is distinct in that an employee can work for a competing business while still employed by his or her employer.

The Act expressly prohibits employers from retaliating against employees for (i) refusing to agree to a non-compete provision, (ii) failing to comply with a non-compete provision or workplace policy made unlawful by the Act, (iii) inquiring or complaining about the existence, applicability or validity of a non-compete provision or a workplace policy that the employee reasonably believes is prohibited, whether to an employer, a coworker, the employee's lawyer, or a governmental entity, or (iv) requesting the proper notice required by the Act.

The Act does not apply retroactively, meaning that non-compete agreements entered into prior to the Act's applicability date are still valid and enforceable.

Is Employee Notice Required?

The Act requires all employers to provide employees with the following written notice either (i) no later than 90 days after the Act's applicability date, (ii) seven days after an employee's date of hire, and (iii) within 14 calendar days of an employee's written request for such notice:

No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020.

What About My Company's Existing Confidentiality Agreement?

The Act does not prohibit or otherwise restrict employers from enforcing their existing confidentiality agreements and expressly allows employers to enforce otherwise lawful contractual provisions and workplace policies that restrict employees from disclosing their employers' confidential, proprietary, or sensitive information, client lists, customer lists, and trade secrets.

Key Takeaways from the D.C. Non-Compete Ban

By enacting the Act, D.C. is virtually affecting a ban on most non-compete agreements and policies and following in the footsteps of states like California, North Dakota, and Oklahoma, which practically ban all non-compete agreements.

While D.C.'s ban applies to virtually all employees at varying income levels, various state legislatures have targeted their efforts to ban employers from requiring lower-wage workers to enter into non-compete agreements.

States That Have Enacted Non-Compete Bans for Low-Wage Workers

Virginia

Under Section 40.1-28.7:8 of the Virginia Code, employers are prohibited from entering into, enforcing, or threatening to enforce a non-compete agreement with any low-wage employee. A "low-wage" employee is an employee whose average weekly earnings are less than Virginia's average weekly wage, which is approximately $1,200 per week or $62,000 per year. Also included in this definition are students, apprentices, and independent contractors who receive an hourly rate less than Virginia's median weekly wage. Notably, Virginia's law permits enforcing non-compete agreements with employees whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses. Virginia's non-compete restriction took effect July 1, 2020.

Maryland

Maryland's legislature has also followed the trend of restricting non-compete agreements for low-wage workers. Its non-compete law, found in Section 3-716 of Maryland's Labor & Employment Article, took effect on October 1, 2019, and prohibits the use of non-compete agreements for employees who earn less than or equal

to $15 per hour or $31,200 annually. Similar to the D.C. law, Maryland's law permits employers to maintain non-solicitation agreements and other contracts with employees related to taking or using client lists or other proprietary business information.

New Hampshire

Similarly, on September 8, 2019, RSA Section 275:70-a took effect in New Hampshire, prohibiting any employer from requiring a low-wage employee to enter into a non-compete agreement. The law defines the term "low-wage employee" as an employee who earns an hourly rate less than or equal to 200 percent of the federal minimum wage or an hourly rate less than or equal to 200 percent of the tipped minimum wage in the state. New Hampshire's law outright prohibits any agreement between an employer and a low-wage employee that restricts the employee from (i) working for another employer for a specified period, (ii) working in a specified geographical area; or (iii) performing the same type of work for another employer at a competing business.

Washington

Washington State's non-compete ban for low-wage workers took effect on January 1, 2020, and can be found at RCW 49.62. Under this law, employers may only enforce non-compete agreements against employees who earn at least $100,000 per year or independent contractors who earn at least $250,000 per year. Washington's law is distinct in two ways. First, it set a higher earning threshold for "low-wage" employees than in most states. Second, it applies retroactively – meaning non-compete agreements executed prior to the law's January 1, 2020 effective date are also subject to the law. However, the statute explicitly states that penalties will only be assessed against an employer who attempts to enforce an unlawful non-compete agreement after January 1, 2020. Similar to the other state statutes governing non-competes, the law does not otherwise restrict confidentiality agreements and other agreements related to trade secrets, proprietary information, or inventions. In enacting its restrictions on non-competes for low-wage employees, the Washington State legislature noted that workforce mobility is essential to economic growth, and these agreements limiting competition or hiring may be unreasonable "contracts of adhesion."

Key Takeaways for Employers

In light of this recent trend of states either regulating the applicability of non-compete agreements and workplace policies or outright prohibiting them, employers should take the following steps to ensure compliance:

- Familiarize yourself with the laws governing non-compete agreements in your state and the states in which your business operates. It is critical to be aware of the specific restrictions (i.e., whether virtually all non-competes are banned or only agreements with low-wage employees, and how that term is defined in the statute). Also, consult with employment counsel who can provide guidance on the specific restrictions each business may be subject to and advise on best practices for compliance.

- Review existing employment contracts, workplace policies, offer letters, and onboarding practices to confirm that none of these documents contain language that may be violative of your state's law governing covenants not to compete. For example, D.C.'s law covers employment contracts and also prohibits employers from including language restricting an employee's outside business activities in their workplace policies.

- Draft or modify existing agreements to protect your business interests. As noted above, most states permit employers to maintain agreements and policies related to confidential, proprietary, or sensitive information, client lists, customer lists, and trade secrets. It may be beneficial to implement or revise

those agreements to be more robust and effective in safeguarding your legitimate business interests, as states trend toward limiting the applicability of non-competes.

If you have any questions on this topic, please contact the author or your Baker Donelson attorney.